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IN THE

Supreme Court of the United States

October Term, 1944

No. 1282

CHARLES A. HOTTENSTEIN, CARL SCHMOYER, and ANDREW FEKETY,

Petitioners,

—vs.—

YORK ICE MACHINERY CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND SUPPORTING BRIEF

ARTHUR GARFIELD HAYS,
GEORGE D. HORNSTEIN,
Counsel for Petitioners.

May, 1945.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners respectfully show to this Honorable Court:

Summary Statement of the Matter Involved

This is a petition for a writ of certiorari to bring up for review a decree of the Circuit Court of Appeals for the Third Circuit which denied leave to file a bill of review.

The application for leave to file a bill of review was based on the doctrine of the *Hazel-Atlas* case on the ground that York Ice Machinery Corporation, the successful defendant

in the original proceeding (brought to enjoin a proposed merger) had perpetrated a fraud upon the court and upon the complainants.

In this case, York Ice Machinery Corporation, to avoid issuance of an injunction against a proposed merger and reclassification of its stock, presented evidence to the District Court that its assets were worth a minimum of $10,000,000 and that its earnings exceeded $800,000 a year (R. 2-3, 8, 11, 70, 76). Certain preferred stockholders (petitioners here and others), relying upon the figures being correct, refused to join in the reclassification and merger and insisted upon an appraisal of their stock. In the appraisal proceeding, they were met with the Corporation's inconsistent claim that its assets had had a value of only $4,000,000 and earnings of less than $490,000 a year (R. 11, 70-71, 78). The Circuit Court of Appeals held that the situation could not be reviewed—that review would be a "futility." (R. 82).

Since the Circuit Court of Appeals in its opinion unanimously states that, if it had the power, the circumstances in the instant case "might lead us to grant leave to file the bill of review," the court apparently considered the circumstances here even more "sordid" than in the *Hazel-Atlas* case where the same court divided upon the desirability of reviewing the original judgment.

The Circuit Court of Appeals states:

> "The basis for the petitioner's motion lies in his allegations that York Ice Machinery Corporation presented or caused to be presented to the District Court in Delaware evidence tending to prove that the value of the assets of the corporation amounted to approximately $10,000,000, whereas, in the appraisal proceeding it presented evidence to the effect that its assets were worth very much less. Under the merger and reclassification, preferred stockholders of York Ice Machinery Corporation who exchanged their shares for the

stock of the consolidated corporation received approximately 83.2% of the equity represented by common stock of the consolidated company and common stockholders of York Ice Machinery Company received approximately 16.8% of the common stock of the consolidated company. Obviously, if the assets of York Ice Machinery Corporation were worth only $5,000,000* at the time of the merger, common stockholders should have received far less, if any recognition. If the value found for the preferred stock by the appraisers is correct it seems probable that the value suggested for the assets of York Ice Machinery Corporation during the proceedings in the District Court in Delaware was far too high" (R. 81).

The allegations and proof of the fraud need not be set forth in full detail since the Circuit Court of Appeals, in its opinion on the instant motion, admits that if the allegations of the present petition are true—and being based upon stenographic transcripts of sworn testimony, they cannot be controverted—the Federal Court was misled. Briefly stated, the facts are as follows:

In January, 1941, York Ice Machinery Corporation proposed a reclassification of its stock which would wipe out unpaid accumulated dividends on the preferred stock amounting to $88.25 a share (R. 14). To give this recapitalization a pretense of legality, it was to be effected in the guise of a merger with a wholly-owned and wholly-inactive subsidiary. Petitioners herein sought to enjoin the proposed merger. This was refused by both the trial court

* The figure of $5,000,000 used by the Circuit Court of Appeals, in its opinion on the present motion, was not used by counsel on either side. The Court may have arrived at this figure by taking the valuation apparently found by the majority appraisers.

and the Circuit Court of Appeals. The latter, on the original appeal herein, characterized the merger as a mere "subterfuge," but refused to enjoin the merger because, the Court said, the preferred stockholders were not prejudiced. Both the trial court and the Circuit Court of Appeals, in elaborate opinions, took occasion to point out that the *uncontradicted* testimony *submitted by the defendant* established that the corporate assets had a *minimum* value of $9,721,346.04, only a few hundred thousand dollars less than the full amount necessary to provide par plus accumulated dividends on the preferred stock (totaling $9,953,691.50) (R. 36, 73, 76). 45 F. Supp. 436, *aff'd*, 136 F. (2d) 944.

The merger certificate was then filed, and the petitioners herein and 66 other preferred stockholders thereupon instituted proceedings for an appraisal, relying on the *uncontradicted* sworn testimony *submitted by the defendant* as to the value of the corporation's assets (R. 73, 76).

At the appraisal proceeding, the Corporation brazenly presented testimony repudiating the testimony it had presented to the Federal Court. New experts offered by the defendant corporation at the appraisal swore that on June 29, 1942 (the date the merger certificate was filed and therefore the date involved in the appraisal proceeding), the assets of the corporation had a value of not more than $4,000,000. In response to a specific question, the witnesses at the appraisal proceeding conceded that the value of the corporation's assets had been *lower* on January 16, 1942 (the date of trial in the Federal Court) than they were on the date involved in the appraisal proceeding (R. 78).

The Corporation, in its answer on this very motion, insists that the testimony presented to the appraisers is true (R. 40).

If the new testimony be true, the prior testimony must have been false—and the Circuit Court of Appeals and Judge Watson, like the stockholders, were misled by the testimony presented in the Federal Court that the valuation was more than double its actual value.

On the question of fairness of the plan, the Federal Court also had considered the question of *earnings*. The estimate of earnings which so impressed the District Court, 45 F. Supp. 436, 438, and the Circuit Court of Appeals, 136 F. (2d) 944, 952, it now develops, was almost double what should have been the estimate *at the time*, according to the now allegedly true testimony presented by the Corporation at the appraisal proceedings.

The disparity in testimony as to (1) asset value and (2) earnings cannot be explained away, as defendant's counsel now try to do, by saying that "the proceedings were different." The *subject matter* testified to was *identical*: (1) asset value and (2) earnings. The Corporation—in dealing with its own stockholders—when it wished to show high figures, produced witnesses who swore to high figures; and when the preferred stockholders attempted to rely on these figures, the Corporation, now wishing to show low figures, produced witnesses who swore to a figure less than 40% of the *minimum* urged upon the Federal Court in the first instance.

Judge Watson had been careful to state in his opinion,

> "If the value of the interest which the preferred stockholders receive under the plan of merger is as much or more than $10,000,000, it certainly is not so grossly unfair as to shock the conscience of the court. And, *insofar as the interest given to the preferred stockholders has less than that value, the plan* approaches the point at which it must be deemed so unfair that the merger *should be enjoined.*" 45 F. Supp. 436, 438.

In view of this crystal-clear statement by Judge Watson, can anyone seriously suggest that the merger would have been approved had the Judge been told that the corporation's *total* assets were worth less than $4,000,000?

The defendant's testimony in the appraisal proceeding caused petitioners to seek leave to file a bill of review.

The Circuit Court of Appeals after stating that the allegations of fraud would justify a bill of review, nevertheless concluded, as follows: "The petitioner by embarking on an appraisal under Section 61 of the Delaware Corporation Law, has put himself in a position where the surviving corporation could enforce its right to claim his stock on the tender of the appraised price by an original bill for specific performance * * * The petitioner has exchanged his rights in stock for a money claim against the consolidated corporation. Under such circumstances a bill of review filed on the District Court of Delaware would be a futility" (R. 82).

The Court ignored the fact (1) that the petitioners and most of the other 66 objecting stockholders refused to surrender their stock at the appraised value (R. 60-61, 65); (2) that an *original* bill for specific performance has *not* been filed; and—more important—(3) that invalidation of the merger will simultaneously invalidate the appraisal, since merger is a prerequisite to an appraisal under the terms of the Delaware statute, Del. Gen. Corp. Law, §61.

This proceeding is brought in good faith; it was not and is not a "strike suit," as the following statement of facts demonstrates:

The original suit was and is one on behalf of all preferred stockholders (R. 12).

The suit was originally instituted by only the three petitioners herein, but the reported opinion of the trial court states that "approximately twelve and one-half per cent. (12½%) of the preferred stockholders filed *written* objections to the plan," 45 Fed. Supp. 436, 436. Sixty-nine (69)

stockholders instituted appraisal proceedings (R. 60-61, 75, 77), and will be directly affected by the decision on this application.

An affidavit on this motion disclosed that a number of substantial stockholders, who justifiably relied on the representative suit maintained by the complaining petitioners, have been stockholders for approximately 10 years—since long before the date when the recapitalization was proposed. These stockholders relied—not theoretically, but *actually*—on the Corporation's testimony in the injunction suit and their counsel closely followed the proceedings (R. 75, 77). By stipulation, these preferred stockholders likewise will be equally affected by the reopening of this injunction proceeding (R. 63).

Jurisdiction

1. The date of the decree to be reviewed is December 29, 1944. A petition for rehearing was duly filed and denied on February 19, 1945.

2. The statute under which jurisdiction is invoked is Section 240(a) of the Judicial Code, as amended.

3. The power of this Court to grant certiorari and then review an order of a Circuit Court of Appeals denying leave to file a bill of review was recently applied in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944).

Questions Presented

1. Once a Federal Court finds that in a proceeding to enjoin a proposed merger, a fraud was perpetrated upon it, is its power to reopen the judgment barred because petitioner—before discovery of the fraud and on the

assumption that the Court's judgment was well-founded—embarked upon an appraisal proceeding, the very means through which the fraud was uncovered?

2. Has a stockholder waived his right to complain of a fraud upon himself and the Federal Court which fraud caused the latter to refuse to enjoin a proposed merger, if—before discovery of the fraud and on the assumption that the Court's judgment was well-founded—the stockholder commenced an appraisal proceeding, and after discovery of the fraud refused to surrender his stock?

3. Does commencement of an appraisal proceeding following refusal of a Federal Court to enjoin a merger, preclude re-opening the judgment even though the result of review would be not only to invalidate the merger but also to void *ab initio* the appraisal proceeding instituted on the assumption that the merger was valid?

Reasons Relied Upon for the Granting of the Writ

1. The decision of the Circuit Court of Appeals as to the effect of instituting an appraisal proceeding is in conflict with the only applicable decision in Delaware.

2. The decision of the Circuit Court of Appeals that a federal court is impotent under the circumstances herein to correct a decision obtained by fraud is in conflict with the applicable decisions of this Court.

3. The decision of the Circuit Court of Appeals that a technicality will prevent undoing fraud is a departure from the accepted and usual course of judicial proceedings and will encourage the practice of fraud in future corporate recapitalizations.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Honorable Court; that the judgment of the Circuit Court of Appeals be reversed; and that petitioners be granted such other and further relief as may seem proper.

ARTHUR GARFIELD HAYS,
GEORGE D. HORNSTEIN,
Counsel for Petitioners.

May, 1945.

PETIT

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YORK ICE MACHINERY CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION

Statement

The facts, so far as this application is concerned, are sufficiently stated in the petition.

Opinion Below

The opinion of the Circuit Court of Appeals is in the record (R. 80-82) and is reported at 146 F. (2d) 835. The opinions of the District Court and the Circuit Court of Appeals on the original trial and appeal therefrom are reported in 45 F. Supp. 436 (D. C. Del. 1942), *aff'd*, 136 F. (2d) 944 (C. C. A. 3d, 1943).

ARGUMENT

POINT I.

The decision of the Circuit Court of Appeals as to the effect of instituting an appraisal proceeding is in conflict with the only applicable decision in Delaware.

The Circuit Court of Appeals admits that the facts in the instant case justify—if they do not require—a bill of review. The Court, however, states that a technicality of Delaware law bars it from granting the relief sought.

It is respectfully submitted that the Court erred in its judgment of the applicable Delaware law.

The Circuit Court of Appeals ruled that a stockholder who seeks an appraisal ceases to be a stockholder and hence it would be a futility to permit a person—who was a stockholder but who had instituted an appraisal proceeding—to reopen a judgment refusing to enjoin a merger.

The Circuit Court of Appeals cited two Delaware cases in support of this theory. Neither case sustains the theory; *one of them holds expressly to the contrary.*

The Circuit Court of Appeals cites *Chicago Corp.* v. *Munds,* 20 Del. Ch. 142, 172 Atl. 452 (1934), a case wherein the Chancellor *refused* to order specific performance, saying that the appraisers had employed an improper standard of appraisal. This case—the only judicial interpretation in the Delaware state courts of Section 61 of the Delaware Corporation Law—demonstrates the exact contrary of the proposition for which it was cited by the Circuit Court of Appeals. Despite the language of the statute that "the decision of the appraisers as to such value of such stock shall be final and binding upon the corporation and such stockholder," the Delaware Court of Chancery held that the decision of the appraisers was *neither* final *nor* binding.

Root v. *York Corporation,* 39 Atl. (2d) 780 (Del. Ch. 1944), was a ruling on an application by the defendant corporation herein to compel the parties to this appeal and 66 other stockholders to turn over their stock at the price determined by the majority of the appraisers, the stockholders having refused to surrender their stock at the appraised value. All the stockholders appeared *specially* to question the jurisdiction of the court. In the opinion cited the court ruled it had the power to *hear* the application. An appeal is now being prosecuted, still on a *special* appearance and before filing of an answer.

The question involved was solely one of jurisdiction. It is not unreasonable to suppose that the Chancellor, if and after an answer is filed, will refuse to order the stock surrendered where the primary prerequisite to the appraisal—a merger—is invalidated by a court of competent jurisdiction, the relief sought by this bill of review.

The Circuit Court of Appeals fails to recognize the foregoing and, on the contrary, assumes that the appraisal proceeding is complete and that therefore the petitioners are not stockholders. If the merger be invalidated, the stockholders who instituted the appraisal proceedings *never ceased* to be stockholders. It cannot be said that their status was irrevocably determined by an appraisal conditioned upon a merger *which is the very subject of review.*

POINT II.

The decision of the Circuit Court of Appeals that a Federal Court is impotent under the circumstances herein to correct a decision obtained by fraud is in conflict with the applicable decisions of this Court.

Even if the Circuit Court of Appeals were correct in its opinion as to the Delaware law (and we have demonstrated that the learned Court erred in that respect) the Federal Court, as a court of equity, would nevertheless have the power to correct a decision in its own court obtained by fraud.

Well established principles of equity entitle a litigant to protection against a judgment fraudulently obtained. See *Marshall* v. *Holmes*, 141 U. S. 589, 601 (1891).

The action of petitioners in initiating an appraisal proceeding cannot be considered more conclusive than the giving of a General Release, which courts—state and federal—have long held, as a matter of public policy, cannot be relied upon by a wrongdoer who procured it by fraud.

It is everyday practice for a court which rescinds a transaction to simultaneously declare void a General Release given at the time of the closing of the transaction, *e.g.*, *Bridger* v. *Goldsmith*, 143 N. Y. 424, 38 N. E. 458 (1894); *Reagan* v. *Union Mut. Life Ins. Co.*, 189 Mass. 555, 76 N. E. 217 (1905); see *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224, 234 (1892). See also Restatement, Contracts (1932) §573.

Similarly in a suit for damages resulting from an accident, the plaintiff may recover despite the fact that after the accident he gave a General Release—if the release was obtained by fraud. In one such case, the court, holding that there was evidence to justify setting aside the release, added "By what legerdemain the defendant, which wishes to use the release, expects to avoid the means by which Clemens

[the wrongdoer] procured it, passes our understanding." *Scheer* v. *Rockne Motors Corp.*, 68 F. (2d) 942, 945 (C. C. A. 2d, 1934).

The only test is whether the party defrauded had exercised ordinary prudence and judgment. *Southwestern Greyhound Lines, Inc.* v. *Buchanan*, 126 F. (2d) 178, 180 (C. C. A. 5th, 1942) and cases therein cited. This Court denied certiorari, 317 U. S. 646 (1942) and denied rehearing, 317 U. S. 707 (1942).

Does respondent seriously contend that petitioners did not exercise ordinary prudence when they acted—commenced an appraisal—on the basis of facts which misled the District Court and Circuit Court of Appeals?

Can a Court say to the defrauded stockholders: "You should not have proceeded to an appraisal, but should have had the clairvoyance to realize that if you did, the defendants would introduce testimony proving false the evidence on which we, experienced judges, relied"?

POINT III.

The decision of the Circuit Court of Appeals that a technicality will prevent undoing fraud is a departure from the accepted and usual course of judicial proceedings and will encourage the practice of fraud in future corporate recapitalizations.

It has long been the practice of this Court to permit a bill to set aside a judgment obtained by "false testimony and forged documents." *Marshall* v. *Holmes*, 141 U. S. 589 (1891); *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944).

In the last-cited case the Court declared, at page 246:

> "Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against

> the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

Court proceedings are not merely private controversies; the public is always interested in the proper administration of justice. See *N. Y. Central Rr.* v. *Johnson*, 279 U. S. 310, 318 (1929).

The public interest in the problem is clear. In these days when stockholders are dependent, realistically, upon corporate management for all their information as to their corporation's assets and prospects—conduct such as here perpetrated *by fiduciaries* cannot be condoned, or other corporate managements will be encouraged to follow suit.

The Court is respectfully reminded that the average stockholder knows nothing of the actual financial condition of his corporation. Once a merger certificate is filed, the stockholder in a Delaware corporation who wishes to protect his rights by an appraisal proceeding must initiate such proceeding within 20 days. The exercise by the plaintiffs of their appraisal rights resulted in discovery of the fraud. After this discovery, petitioners asked that the Court review the merger. The answer was 'No, you can't have the merger reviewed *because* you asked for an appraisal.' If the petitioners hadn't asked for an appraisal, the fraud would never have been discovered.

If a stockholder cannot find out that he has been misled as to the actual status of the corporation until after he institutes the appraisal proceeding, and the fact that such

proceeding was instituted constitutes a bar to his obtaining relief from the fraud, an Alice-in-Wonderland dilemma results which does not reflect credit upon our legal system.

After the decision of the Federal Court refusing to enjoin the merger, stockholders had only two alternatives: (1) they could institute an appraisal proceeding, as petitioners did; or (2) they could turn in their stock for stock of the new corporation formed by the merger. If respondent be correct, petitioners (and the Court) are helpless whichever alternative they adopt. As to (1) respondent contends that petitioners forfeit their rights by seeking an appraisal. As to (2) can there be any doubt that if, after the court had refused to enjoin the merger, petitioners actually turned in their stock [thereby incidentally confirming the merger], respondent would—with equal vehemence—resist a petition to reopen the merger on the ground that petitioners had surrendered their rights as stockholders? In other words, has a means been invented by the respondent wherein an admitted fraud may be brazenly perpetrated—not only in this case, but in any corporate reorganization, *without possibility* of correction by the courts?

CONCLUSION.

A court has inherent power to vindicate and protect its existence and powers, and where a fraud has been perpetrated upon it, action thereafter taken on the assumption that the judgment was sound does not necessarily bar review when the fraud is discovered.

Petitioners anticipate that respondent will argue, as it did in the Court below (Respondent's Brief on Reargument, p. 3) "that the merger actually has taken place and has been so far consummated that it could not possibly be undone." But that should not prevent equity being done the petitioners and others prejudiced by the fraud. *Even if it be*

true that the merger cannot now be undone, petitioners and other non-assenting stockholders are still entitled to relief in the Federal Court, sitting as a court of equity. Petitioners certainly acted diligently in their efforts to prevent the merger. The controlling issue in the action to enjoin the merger was whether or not the claim of merger was fair to the preferred stockholders. If the plan was held not to be fair, then the defendant's proposed merger would have been enjoined absolutely or subject to the provision that it could be effected only upon payment in full to the non-assenting preferred stockholders. This provisional arrangement as to payment to stockholders could have been and may still be effected in the same manner in which it was carried out under the decision of *Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765 (C. C. A. 8th, 1906); 199 Fed. 64 (C. C. A. 8th, 1912); 233 Fed. 49 (C. C. A. 8th, 1916). This much relief, at the very least, can and should be granted.

Considerations of substantial importance to corporate recapitalizations are involved, and the effective administration of justice calls for certiorari. *Young* v. *The Highbee Corporation*, U. S. Sup. Ct., Feb. 26, 1945.

The petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

ARTHUR GARFIELD HAYS,
GEORGE D. HORNSTEIN,
Counsel for Petitioners.

May, 1945.

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YORK ICE MACHINERY CORPORATION,
Respondent.

No. 1282.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

October Term, 1944. No. 1282.

Charles A. Hottenstein, Carl Schmoyer and Andrew Fekety, Petitioners,

v.

York Ice Machinery Corporation, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

A history of the proceedings, stated as concisely as the facts will permit, is required for a proper understanding of the question involved.

Respondent, in January 1941, submitted to its stockholders a plan for the merger into itself of its wholly-owned subsidiary (York Corporation), and for the exchange of its outstanding preferred and common stock for new common stock, on the basis of 15 shares of new common stock for each share of old preferred stock and accrued dividends, and one share of new common stock for each share of old common stock. Promptly thereafter these Petitioners filed in the United States District

Court for the District of Delaware a Bill to enjoin the merger, although they had acquired their stock only in December 1940, being the month previous to the month when the merger plan was announced publicly and after, in fact, the news had been distributed in November 1940, throughout financial circles through the Dow-Jones News Service that the preferred and common stock of the corporation would be exchanged on the basis stated above (R. 52). The injunction suit was tried on the merits in the summer of 1941 before Judge Nields. However, Judge Nields resigned before filing an opinion and the case was heard *de novo* before Judge Watson, who was specially assigned to hear it.

At the trial of the injunction suit, it was claimed (1) that the merger was illegal because Respondent had no power, under the Delaware law, to consummate a merger with a wholly-owned subsidiary and thereby affect the rights of preferred stockholders, and (2) that the terms of the merger were unfair to the preferred stockholders. Evidence was introduced with respect to Respondent's assets, and the testimony showed that the book value of its plant account, as stated on its balance sheet, had been written down in previous years. No evidence was submitted as to the value of the plant account other than its reproduction cost new less depreciation. Other evidence relevant to the issue of unfairness was introduced, which included evidence with respect to earnings, the transfer of voting control of the corporation from the common to the preferred stockholders as a direct result of the merger, and other factors tending to show the fairness of the plan to the holders of both classes of stock. Hottenstein *v.* York Ice Machinery Corp., 45 F. Supp. 436.

The District Court, in an opinion delivered by Judge Watson, dismissed the Bill for Injunction, holding that the merger was legal under the Delaware Law and that the distribution of the stock between the preferred and

common stockholders was not unfair. An intervening preferred stockholder appealed to the Circuit Court of Appeals, which in a unanimous opinion delivered by Judge Biggs on June 15, 1943, affirmed the decision of the District Court. A petition for reargument was filed but was denied.

Petitioners thereupon proceeded under the Delaware statute to an appraisal of their stock. They appointed one appraiser, the Respondent appointed a second appraiser, and the Chancellor, as provided under the Delaware law, appointed a third appraiser. Voluminous testimony, occupying over 700 pages, was taken before the Appraisers (R. 47). The entire record of the testimony in the District Court was presented to the Appraisers. A substantial portion of that testimony was read into the record and the reports of Day & Zimmermann with reference to the business and to the reproduction cost new less depreciation of the plant of Respondent, which had previously been introduced in evidence in the injunction suit, were submitted to the Appraisers (R. 54-60 and Appendix, pp. 4a, 8a). The position proposed to be taken in the appraisal proceedings by the Respondent, which is now claimed to be fraudulent and similar to "false testimony and forged documents", so as to permit the filing of a Bill of Review, was stated at some length by counsel for the Respondent at the hearing before the Appraisers. Robert H. Richards, of the Wilmington, Delaware Bar, after Petitioners' attorneys had made their statements, made on behalf of Respondent a statement which is quoted in part as follows (R. 48-50):

> "'MR. RICHARDS:—Just a moment, please. I would like to make a statement, a very brief one, indicating our position, because the learned counsel on the other side have given their theories, and I think the appraisers [fol. 57] should know what our position is before we hear from them further.
>
> "'You have a simple duty, which may necessitate a good deal of consideration and work on your part

in evaluating and considering the various kinds of evidence that will be submitted to you. Of course you gentlemen are not lawyers, and I am not going to discuss a lot of law with you.

* * * * * * *

" 'The validity of this merger was challenged by my friends and tried and decided by the Judge in the District Court for this district, and decided on review by the Circuit Court of Appeals, and held to be a valid merger, and that is the end of that.* * *

" '* * * The things that are to be considered are all the elements of value that can properly enter into the value of a share of stock—whatever kind it may be; preferred or common—as of a certain date.

[fol. 58] " 'Now, what are those elements? They are market value, asset value, earnings record, dividend record, and any facts known or that may be ascertainable as of that date that would throw some light on the future prospects of the company. Nothing that is actually the result of the merger, as the statute says, can be taken into consideration. But you can take a corporation as of a certain date, and it is possible and conceivable of course that certain facts may be proved that would throw some light on the future prospects of the company, and they are properly considered. But as the Chancellor said in this case where the parties to the case discussed only two of the elements, which were market price and asset value, in the case of Chicago Corporation *vs.* Munds, in 20 Del. Ch. Reports, page 142, in the conclusion of that opinion—I am not going to read it all; it is a very short paragraph in which the Chancellor says:

" 'There is no need at this stage of the case for me to enter upon a discussion of the sort of considerations which should be taken into account in the

valuing of the defendants' stock. Market value undoubtedly is a pertinent consideration. So is net asset value. Neither, however, deserves necessarily to be accepted as exclusive. Those are the only two standards of measure that the respective parties to this cause have insisted upon as governing, and I shall abstain from embarking upon a general discussion touching other possible elements that might under varying circumstances be taken into account'."

" 'Those are two of the elements to be considered, but neither one is exclusive. In other words, the elements of value which an experienced business man who knows something about valuing stock would think proper to be considered in determining the value of the share of stock at a particular date is what you are to consider, * * *'." (pp. 13-17)

Thereafter, Aaron Finger, of the Wilmington, Delaware Bar, also of counsel for Respondent, after the dissenting stockholders had rested their case, made a statement on the record which is quoted in part as follows: (R. 50)

"MR. FINGER:—Before calling our witnesses I would like to say just a brief word.

"The testimony that we are going to present will be that type which we believe is customary and normal to consider in valuing the stock of a corporation. That testimony will be testimony in the form of balance sheets, records of earnings, dividend records, market quotations, and such other factors as usually enter into the value of shares of stock.

"In addition to that testimony we are going to call witnesses who are qualified by training and experience to form an opinion concerning the value of shares of stock, and those witnesses will detail to you the nature of the studies they made and the factors they took into consideration and the con-

clusion at which they arrive as to the value of the stock.

"Before presenting that evidence, however, it seems to me desirable that we clear up somewhat—not at any great length; it will be done very shortly—a situation that was produced at the last hearing.

"So far, practically the only evidence that the appraisers have before them is evidence with respect to asset values or book values. We all know, and our witnesses will testify, that asset values or book values do constitute a factor to be taken into consideration, but that it is only one of the factors, one of the elements, and we think it is a minor factor.

"What we want to clear up, particularly, however, is that this evidence that was presented was presented in such a way as to possibly create the impression that the Day & Zimmerman report was a report giving the opinion of that firm as to the value of the assets of this corporation. The fact of the matter is that this engineering report was presented in connection with a hearing where the problem was entirely different from the problem you have here, namely: a question of fairness [fol. 60] of a plan of merger, the fairness of the terms of the plan of merger. In that connection the report merely shows the reproduction new value of those assets, less depreciation, and as will appear from the testimony that we will read into the record, the proponents of that testimony disclaimed any intention of claiming that that represented the fair value of those assets."

Pursuant to the opening statement of counsel for Respondent, the testimony of three independent experts was heard. They gave their respective opinions as to the value of the preferred stock as of the date when the merger became effective, to wit, June 29, 1942. In arriving at their opinions, the experts stated they had taken into

consideration asset value, earnings record, market value, dividend record and future prospects of Respondent. The evidence of asset value which they took into consideration was the same as that presented in the injunction suit; and all three experts, in giving their opinions as to the value of the preferred stock, stated that, on the basis of asset value *alone,* the value of the preferred stock would be in excess of the call price and accumulated dividends. All three experts testified, however, that they considered asset value of less importance than other factors in determining the value of the stock. In addition, John F. Lebor, Assistant Treasurer of Respondent, testified at length regarding Respondent, its financial and operating conditions, and presented an estimate of future earnings. (Appendix, 6a, 8a.) After mature deliberation the Appraisers, in a majority report, appraised the preferred stock of Respondent at $90 per share as of June 29, 1942 (R. 53).

Petitioners then filed a declaratory judgment suit in the United States District Court for the District of Delaware contending that the award of the Appraisers was invalid and that they were entitled to $197.50 for each share of preferred stock. On August 4, 1944, Judge Leahy dismissed the action, his opinion being reported in Root *et al v.* York Corp., 56 Federal Supplement, 288.

After the Appraisers had made their award, Respondent petitioned the Delaware Chancery Court to compel Petitioners to transfer their stock upon payment of the appraised valuation. A motion to dismiss that petition was denied, from which decision petitioners have appealed to the Supreme Court of the State of Delaware, and that proceeding is still pending (R. 53).

The protracted litigation of Petitioners to have the merger declared illegal has now culminated in the instant proceedings, wherein petitioners have asked leave to file a Bill of Review upon the ground that Respondent in the appraisal proceedings had "impeached the testimony"

offered in the injunction suit, had "committed a fraud" and had "tampered with justice". When the Petition for leave to file a Bill of Review came up for consideration on December 8, 1944, oral arguments were heard by Judges Biggs, Jones and Goodrich, and the Circuit Court of Appeals in a unanimous decision dismissed the petition (R. 80). Petitioners' motion for a reargument was denied (R. 85).

Petitioners have now added to the litigation by presenting to this Court a Petition for Certiorari and have repeated the charge that a fraud has been perpetrated on the Courts.

Due to the necessity of filing this brief within the time prescribed by the rules of this Court, there are included herein references to the Appendix attached to the petition for certiorari, being contemporaneously filed with this Court, to correct a diminution in the record. Such Appendix contains the docket entries in the Circuit Court of Appeals for the Third Circuit and the Reply to the Affidavit of George D. Hornstein, which are not included in the original transcript of record filed herein but which have been certified as a supplement to said record by the Clerk of said Circuit Court of Appeals and forwarded on or about May 31, 1945, to the Clerk of this Court. The documents appearing in said Appendix, being a supplement to the record as stated in the petition for certiorari, contain important statements of fact and extracts from the record in the previous proceedings and are essential to a complete understanding of both the basis of the charges made by counsel for the Petitioners and the defenses interposed on behalf of the Respondent.

THE QUESTIONS INVOLVED.

(1) Where in an injunction suit to restrain a merger the company involved introduced evidence as to the value of its assets as well as evidence of earnings and other evidence relevant to the fairness of the terms of the merger, is fraud committed in a later proceeding to appraise the shares of preferred stock of such company by the introduction of testimony of expert witnesses who gave their opinions of the value of such stock on a certain date, in which opinions values were given for the stock lower than if such valuation were based on assets *alone*, the appraisers also having had presented to them the evidence given in the injunction suit as to the value of the assets, and no other evidence as to the value of the assets, and the witnesses who gave their opinions as to the value of the stock having assumed a value for the assets consistent with the evidence in the injunction suit; the expert witnesses having testified that other factors such as earnings, dividends, past record, future prospects, etc., of an industrial company were more significant than asset values in determining the value of the stock?

(2) Can an estimate of future earnings, as given by one of the experts in valuing the stock, be regarded as proving fraud because that estimate is substantially lower than actual earnings in one of the two previous years; independent of the testimony of other witnesses for the Company predicting higher future earnings?

SUMMARY OF ARGUMENT.

I. THE EVIDENCE AS TO VALUATION OF ASSETS WAS THE SAME IN BOTH THE INJUNCTION SUIT AND THE APPRAISAL PROCEEDING.

II. IN THE APPRAISAL PROCEEDING, RESPONDENT DID NOT PROVE OR OFFER TO PROVE ANY VALUE FOR THE ASSETS THAT WAS LOWER OR OTHERWISE DIFFERENT FROM THE VALUES OF ASSETS PRESENTED BY RESPONDENT IN THE INJUNCTION SUIT.

III. IN THE APPRAISAL PROCEEDING EXPERTS TESTIFIED AS TO THEIR OPINIONS OF THE VALUE OF THE *STOCK;* BUT, IN REACHING THEIR CONCLUSION, THEY CONSIDERED THE SAME EVIDENCE OF VALUES OF ASSETS THAT WAS PRESENTED BY RESPONDENT IN THE INJUNCTION SUIT.

IV. CORPORATE STOCK, PARTICULARLY OF AN INDUSTRIAL CORPORATION, IS NOT PROPERLY VALUED SOLELY ON THE BASIS OF ASSETS. OTHER FACTORS SUCH AS PAST EARNINGS, REASONABLY EXPECTED FUTURE EARNINGS, DIVIDENDS, MARKET VALUES, ETC. ARE MORE SIGNIFICANT.

V. THE ALLEGATION THAT THE EVIDENCE OF EARNINGS GIVEN IN THE APPRAISAL PROCEEDING IS INCONSISTENT WITH THAT GIVEN IN THE INJUNCTION SUIT IS BASED UPON AN ATTEMPTED COMPARISON OF THE AVERAGE OF ACTUAL EARNINGS FOR THE YEARS 1940 AND 1941 WITH A PREDICTION OF FUTURE EARNINGS BY ONE OF RESPONDENT'S WITNESSES IN THE APPRAISAL PROCEEDING, INDEPENDENT OF TESTIMONY OF OTHER WITNESSES FOR RESPONDENT WHO PREDICTED HIGHER FUTURE EARNINGS.

VI. PETITIONERS BOUGHT THEIR STOCK AFTER IT HAD BECOME PUBLICLY KNOWN, THROUGH THE DOW JONES NEWS SERVICE, THAT THE STOCK WAS TO BE EXCHANGED ON THE BASIS OF FIFTEEN SHARES OF NEW COMMON FOR EACH SHARE OF PREFERRED. THUS PETITIONERS BOUGHT INTO THE SITUATION WITH KNOWLEDGE OF THE PLAN AND THEN STARTED SUIT TO ENJOIN THE PLAN. THEY NEVER WERE AND ARE NOT NOW IN COURT WITH CLEAN HANDS.

ARGUMENT.

The charge of fraud is one of the gravest that can be made against parties to proceedings and counsel who have represented them. What are the specific fraudulent acts complained of? They are stated on page 2 of the petition, as follows:

> "In this case, York Ice Machinery Corporation, to avoid issuance of an injunction, against a proposed merger and reclassification of its stock, presented evidence to the District Court that its assets were worth a minimum of $10,000,000 and that its earnings exceeded $800,000 a year (R. 2-3, 8, 11, 70, 76). Certain preferred stockholders (petitioners here and others), relying upon the figures being correct, refused to join in the reclassification and merger and insisted upon an appraisal of their stock. In the appraisal proceeding, they were met with the Corporation's inconsistent claim that its assets had had a value of only $4,000,000 and earnings of less than $490,000 a year (R. 11, 70-71, 78).

Analyzing Petitioners' contention, it has to do with alleged fraudulent claims by Respondent with respect to (*a*) its assets and (*b*) its earnings. It is claimed that Respondent "presented evidence to the District Court that its assets were worth a minimum of $10,000,000" but in the appraisal proceedings Respondent made the claim "that its assets had had a value of only $4,000,000."

Respondent presented no evidence in the District Court that its assets were worth a minimum of $10,000,000. This is borne out by the opinion of Judge Watson, in which he stated "there was no evidence submitted which purported to be an estimate of the actual fair value of the fixed assets of the defendant." Hotienstein *v.* York Ice Machinery Corp., 45 Fed. Supp. 436, 438.

Respondent presented no testimony in the appraisal proceeding "that its assets had a value of only $4,000,000."

On the contrary, the *only* evidence as to value of *assets* that was presented to the Appraisers was the identical evidence that had been introduced in the injunction suit. On the subject of the value of the *stock*, all of the expert witnesses testified that in determining such value they took into consideration not only assets but also management, dividend record, past and prospective earnings, and other relevant factors. The following testimony on cross-examination of Mr. Bancroft, one of Respondent's expert witnesses, illustrates that he was not attempting to give the value of the assets, but was speaking of the value of the stock (Appendix, pp. 6a, 7a):

> "Q. Assuming that that was the fair value and taking a value of $3,800,000, you mean to say that the net worth of this Company was not more than $4,000,000?
>
> "A. I was talking about the value of the stocks of the Company, not the net worth."

To the same effect was the testimony of Mr. Bracken, another of Respondent's expert witnesses, showing that he was discussing the valuation of the preferred stock, not the valuation of the assets, viz (Appendix, p. 7a):

> "X. In your opinion, in June, 1942, a fair offer for this Company would have been four million dollars. Is that right?
>
> A. Well, I said $3,944,000.
>
> X. Close enough. Approximately four million dollars would have been a fair appraisal for the purchase of this whole Company, lock, stock and barrel? That is your opinion?
>
> A. I refuse to say whether that is for purchase or not. I say that is my valuation of the preferred stock, and I give no equity for the common stock other than a very speculative value."

Counsel for Petitioners repeatedly proceeded in their cross-examination on the basis of assuming a valuation

for Respondent by multiplying the number of shares of preferred stock outstanding by the valuation per share set by the expert witnesses and then comparing the resultant figure with the reproduction cost new less depreciation of Respondent's plant account, but the witnesses uniformly stated that asset value was only one factor to be considered in appraising the preferred stock and that in their opinion the most important factor in fixing such a value was the earning power of Respondent, both past and prospective (Appendix, pp. 7a, 8a).

Thus, not only did Respondent make no attempt to present a different valuation for its assets in the appraisal proceeding than that presented in the injunction suit, but, as a matter of fact, there was introduced in the appraisal proceedings all the evidence presented in the injunction suit as to value of assets, and *no other evidence on this subject was presented in the appraisal proceeding.* This evidence was actually considered by the experts, along with other relevant factors, in reaching their determination of the value of the preferred stock; and this procedure was in accordance with the Delaware law.

Petitioners contend, in effect, that their preferred stock should have been valued solely on the basis of asset values. If authority were needed to refute this, the only Delaware decision on the subject of the basis for appraising stock of a dissenting stockholder holds that it is improper to consider asset values alone. *Chicago Corporation* v. *Munds,* 20 Del. Ch. 142, 172 Atl. 452.

Fraud is also charged against Respondent by alleging that Respondent presented evidence in the injunction suit that "its earnings exceeded $800,000 a year" whereas in the appraisal proceedings Respondent claimed that it had "earnings of less than $490,000 a year."

It is difficult to answer with patience such an unfounded allegation.

The testimony in the injunction suit, as stated by Judge Biggs and quoted hereafter, was that Respondent's net earnings in 1940 were $483,121 and in 1941 were

$1,202,000, or an average of actual net earnings for those two years of approximately $800,000 per annum. The net earnings figure of $490,000 a year used by Petitioners was a prediction of *future* net earnings, given by *one* of the expert witnesses (Appendix, p.). The other expert witnesses gave higher estimates, but, of greater significance, the only officer of Respondent who testified in the appraisal proceedings, John F. Lebor, the present Treasurer of Respondent, estimated its future net earnings at $1,500,000 before income and excess profit taxes. The following quotation is from his testimony (Appendix, p. 6a):

"By MR. KANN:

* * * * * * *

RQ. On an amount of that nature what would be the profit before taxes, after all charges except taxes?

A. That I am not prepared to give an opinion on. We hope that we are going to improve the Company's profits.

RQ. You have worked out no percentages as to what the margins would probably be if the volume were on that basis, but have you any personal opinion?

A. I can give you this: in my own responsibility, which is in the field of financial management, I have had to do some thinking on that, and I have personally used a twenty million, 7½ per cent margin of profit, which is better than we have done before. *It is higher than I heard Mr. Bracken testify to this morning.*

RQ. That would be about a million and a half dollars. That would be before taxes?

A. Before taxes? No, after all taxes except taxes based upon income—that is, Social Security, and all that. Everything except income and excess profit taxes."

One reading the Petition for Certiorari would naturally assume that the comparison of earnings figures of $800,000 a year and $490,000 a year were upon the same basis. The Petition gives no indication that the figure of $800,000 a year was actual *past* earnings for the years 1940 and 1941 and that the figure of $490,000 a year represented the prediction of *one* witness of *future* earnings or that other witnesses predicted higher earnings, or that the only officer of Respondent who testified on the subject gave a higher estimate.

A studied attempt seems made to persuade the Supreme Court that the earnings being compared are comparable. Without qualification Petitioners have indicated, inferred or suggested to the Court, in substantiation of their claim of fraud, that the earnings to which they refer are of the same character and are therefore capable of being set one against the other. The charge of fraud against Respondent in the conduct of these proceedings is proclaimed again and again, but when the facts are examined, the true character of the nature of the Petition is exposed.

The Petition (p. 5) speaks of an

> "estimate of earnings which so impressed the District Court, 45 F. Supp. 436, 438, and the Circuit Court of Appeals, 136 F. (2d) 944, 952, • • •".

As to the District Court, that it was not so impressed is demonstrated by the following quotation from the opinion:

> "The evidence with regard to the earnings of the defendant is similarly inconclusive. *Neither side offered testimony as to the probable future earnings of the company.* The evidence received dealt only with the past earnings of the company up to September 30, 1941. While the past earnings of a corporation are ordinarily of considerable value in esti-

mating probable future earnings, in the present case they are insufficient to form the basis of anything but the wildest guess as to the probable future earnings." (Emphasis ours.)

As to the Circuit Court of Appeals, that Court made no reference to estimates of future earnings, but only to past earnings. Judge Biggs referred to this subject of earnings as follows:

> "An examination of the income account of the defendant year by year for the five years ending September 30, 1940, shows its operations resulted in net income in 1940 of $483,121, in a loss in 1939 of $185,076, in a loss in 1938 of $119,753, in net income in 1937 of $957,649 and in net income in 1936 of $165,586. The financial statement of the defendant also shows a net income of $1,202,000, for 1941. The earned surplus for this year was in excess of $800,000 contrasting with an earned surplus of $403,000 for the year 1940."

Such then are the allegations of fraud charged against Respondent.

A comparison has been made by Petitioners with the use of "false testimony and forged documents", but the record demonstrates the complete absence of justification for the charge, or for the intemperate language which pervades the petition.

CLEAN HANDS.

All three petitioners acquired their stock in December 1940, being the month previous to the month when the merger plan was announced publicly and after news that this preferred stock was to be exchanged for new

common stock on a fifteen for one basis had became known in financial circles through the Dow Jones News Service in November, 1940 (R. 52). Having thus bought into the situation with knowledge of the plan, they proceeded to attack it by bill for injunction filed before the meeting of stockholders called to act on the plan (R. 9, 12-16). They therefore never were and are not now in court with clean hands. *Windhurst* v. *Central Leather Co.* (101 N. J. Eq. 543—1927), 138 Atl. 772, 775.

Incidentally, Petitioners' cost for the stock seems to have been not more than $46.00 per share (R. 52). The award in the appraisal proceeding gave them $90.00 per share (R. 53).

REPLY TO PETITIONERS' ARGUMENT.
(Pg. 12 of petition and brief.)

Petitioners attempt to make three points in their brief.

The first point is that the decision of the Circuit Court of Appeals is in conflict with the only applicable decision in Delaware. This statement is not true. The case referred to, Chicago Corporation *v.* Munds, 20 Del. Ch. 142, 172 Atl. 452, does not hold that the decision of the appraisers in an appraisal proceeding under the Delaware statute is "neither final nor binding". The court could have had no power so to hold when the Delaware statute says that such an appraisal "shall be final and binding". The effect of what the case decides is that, when in such a proceeding the appraisers refused to consider any evidence as to the value of the stock being appraised except the market price thereof, it was not such an appraisal as is contemplated by the statute. The decision was on a motion for judgment on pleadings. The Chancellor contemplated there would be further proceedings in the case. There were none because the case

was settled. If the case had gone to final decree on the merits with the same facts as those considered in the Chancellor's opinion, the final relief undoubtedly would have been that the Chancellor would have ordered a new appraisal.

The second point is based on the assumption that the Circuit Court of Appeals in this case found that Respondent had been guilty of fraud. The Circuit Court of Appeals made no such finding.

The third point is based on the assumption of the soundness of both the first and second points. Since both these points are unsound, the third point necessarily falls.

There is no public interest involved in this case. It is merely one of the usual disputes that frequently follow merger proceedings between corporations. It is a controversy pressed by persons who, *with knowledge* of a plan of recapitalization then under consideration by Respondent, acquired stock in Respondent and proceeded to attack the plan, but have found Respondent as determined to resist their harrassment as Petitioners are persistent in pursuing their objective, whatever it may be.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

George S. Munson,
Philadelphia, Pennsylvania.

Robert H. Richards,
Aaron Finger,
Wilmington, Delaware.
Counsel for Respondent.

Dated June 5, 1945.

JUN 6 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944.

CHARLES A. HOTTENSTEIN, CARL SCHMOYER and ANDREW FEKETY,
Petitioners,

v.

YORK ICE MACHINERY CORPORATION,
Respondent.

No. 1282.

PETITION FOR A WRIT OF CERTIORARI TO CORRECT A DIMINUTION OF RECORD.

GEORGE S. MUNSON,
PHILADELPHIA, PA.

ROBERT H. RICHARDS,
AARON FINGER,
WILMINGTON, DELAWARE.
Counsel for Respondent.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

Supreme Court of the United States

OCTOBER TERM, 1944.

Charles A. Hottenstein, Carl Schmoyer and Andrew Fekety, Petitioners,

v.

York Ice Machinery Corporation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO CORRECT A DIMINUTION OF RECORD.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE ABOVE COURT:

York Corporation (formerly York Ice Machinery Corporation), the respondent above named, suggests to this Court that, in connection with the petition for writ of certiorari filed herein, the transcript of record, duly certified and filed herein on the 16th day of May, 1945, is incomplete and that there is a diminution of said record, in that the following described papers, viz.:

Docket Entries in Circuit Court of Appeals for the Third Circuit

Reply to Affidavit of George D. Hornstein

are a part of the record in said cause and are essential to a complete understanding of the questions raised in this Court, but are not included in and made a part of the original transcript of record duly certified and filed herein on the date aforesaid; but that a supplement to said

record, consisting of the above described papers, was duly certified by the Clerk of said Circuit Court of Appeals and forwarded by him on or about May 31, 1945, to the Clerk of the Supreme Court of the United States.

It appears from said supplemental transcript of record that on December 8, 1944, the date when oral argument was heard before the Judges of the Circuit Court of Appeals (R. 68), Seymour M. Heilbron, of counsel for Petitioners, filed a lengthy affidavit setting forth certain allegations and evidence presented in both the injunction suit and appraisal proceedings. Seven days after the argument before the Circuit Court of Appeals, to wit, on December 15, 1944, George D. Hornstein, also of counsel for Petitioners, filed his affidavit in the proceedings, which also contained certain allegations and evidence presented in both the injunction suit and the appraisal proceeding. Those affidavits of counsel are included in the docket entries and in the original transcript of record. Thereafter, on December 19, 1944, counsel for Respondent filed a reply to the Hornstein affidavit, which reply was noted on the docket and contained important statements of fact and extracts from the record in the previous proceedings which refuted allegations contained in the Hornstein affidavit. The filing of the Hornstein affidavit and the said reply thereto were noted in the docket entries in the Circuit Court of Appeals for the Third Circuit as follows:

> "Dec. 15, 1944 Affidavit of George D. Hornstein filed.
>
> Dec. 19, 1944 Reply of Defendant to Affidavit of George D. Hornstein filed".

Said supplement to the record is essential to a proper understanding of both the basis of the charges made by counsel for the Petitioners and the defenses interposed on behalf of the Respondent, and the exclusion thereof from the record will be prejudicial to Respondent and prevent an adequate examination of the facts. Thereafter briefs

and memoranda of counsel were filed, both on behalf of the Petitioners and Respondents, in support of and in opposition to a motion for reargument, but such briefs and memoranda are not included as a part of either the original transcript of record filed or the supplement to the record covered by this petition.

Respondent has requested counsel for Petitioners to stipulate for the inclusion of said supplement in the record of this cause, but Petitioners' counsel have refused to do so. The only reason given for such refusal was that the reply to the Hornstein affidavit was in the nature of a brief and was not sworn to. Said reply was a written document, signed by counsel for Respondent, and was submitted under the sanctity of the general oath of the attorneys at law who signed it. It could have had no greater or higher sanctity if it had been specifically sworn to, as was Mr. Hornstein's affidavit.

WHEREFORE Respondent moves that this Court direct that the certified supplement forwarded to the Clerk of this Court on or about May 31, 1945, by the Clerk of the Circuit Court of Appeals for the Third Circuit, as a supplement to said transcript of record filed herein on May 16, 1945, be included in and made a part of the transcript of record in this cause. A copy of said supplement to the record is appended to this motion.

GEORGE S. MUNSON,
ROBERT H. RICHARDS,
AARON FINGER,
Counsel for Respondent.

COMMONWEALTH OF PENNSYLVANIA }
CITY AND COUNTY OF PHILADELPHIA }

I, GEORGE S. MUNSON, counsel for the Respondent in the above entitled cause, do solemnly swear that the facts recited in the foregoing petition for writ of certiorari are true.

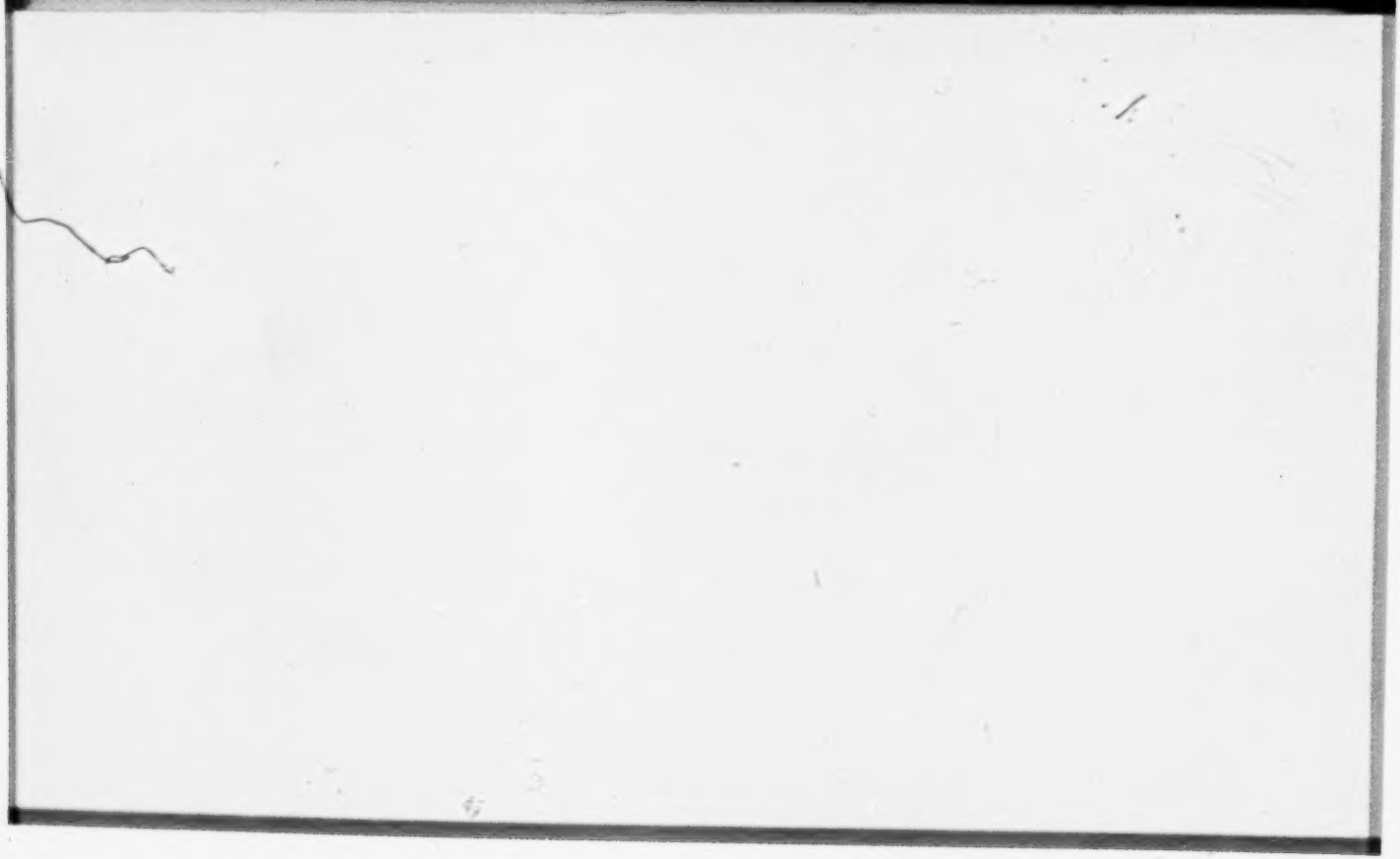
GEORGE S. MUNSON,
Counsel for Respondent.

Sworn to and subscribed before me, this 5th day of June, 1945.

(SEAL)

MARGARET C. MALCOMSON,
Notary Public.

My Commission Expires February 23, 1949



UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 8097.

Charles A. Hottenstein, Carl Schmoyer and Andrew Fekety,

Plaintiffs,

R. Thomas Moore, et al.,

Intervenors,

v.

York Ice Machinery Corporation,

Defendant,

R. Thomas Moore,
Intervening Complainant-Appellant.

DOCKET ENTRIES.

July 25, 1942 Notice of Appeal filed.

July 25, 1942 Appearances of counsel entered.

Aug. 21, 1942 Stipulation extending time for filing Record to Sept. 12, 1942 and Appellants brief by Sept. 28, 1942, filed.

Aug. 21, 1942 Order extending time for filing Record to Sept. 12, 1942 and Appellants brief by Sept. 28, 1942, filed.

Sept. 14, 1942 Transcript of Record from District Court filed.

Sept. 14, 1942 Copy of Transcript of Record from District Court filed.

Sept. 23, 1942 Statement of Parts of Record to be Printed in Appendix to Appellants Brief filed.

Sept. 24, 1942 Transfer to Argument List.

Sept. 28, 1942 Brief for Appellant filed.

Sept. 28, 1942 Appendix to Appellants Brief filed.

Oct. 13, 1942 Brief for Defendant Appellee filed.

Oct. 19, 1942 Reply brief for Appellant filed.

Oct. 19, 1942 Argued—Coram: Biggs, Jones & Goodrich, *JJ.*

June 15, 1943 Opinion of the Court by Biggs, *J*, filed.

June 15, 1943 Order Affirming Judgment each party to bear his own costs filed.

June 15, 1943 Copy of Opinion to Richard J. Mackey.

July 2, 1943 Order extending time for filing petition for Rehearing five days filed.

July 2, 1943 Petition for Rehearing filed.

July 15, 1943 Order Denying Petition for Rehearing filed.

July 21, 1943 Mandate issued.

Nov. 27, 1944 Petition for Leave to file Bill of Review in the U. S. District Court of Delaware filed.

Dec. 2, 1944 Order to Show Cause Returnable Dec. 8, 1944 filed.

Dec. 7, 1944 Answer of York Corp. (Formerly York Ice Machinery Corp. Defendant) to Order to Show Cause filed.

Dec. 7, 1944 Affidavit of John F. Lebor in support of Answer filed.

Dec. 8, 1944 Reply Affidavit filed.

Dec. 8, 1944 Heard on Petition for Bill of Review, Coram; Biggs, Jones & Goodrich, *JJ.*

Dec. 15, 1944 Affidavit of George D. Hornstein filed.

Dec. 19, 1944 Reply of Defendant to Affidavit of George D. Hornstein filed.

Dec. 29, 1944 Opinion *Sur* Motion for Leave to File a Bill of Review by Biggs, *J.* filed.

Dec. 29, 1944 Order Denying Petition to File a Bill of Review and Discharging Rule to Show Cause of Dec. 2, 1944 filed.

Dec. 29, 1944 Copy of Opinion *Sur* Motion etc to William H. Foulk.

Jan. 11, 1945 Petition for Rehearing of Motion to File a Bill of Review filed.

Jan. 12, 1945 Memorandum in Support of Motion for Reargument filed.

Jan. 18, 1945 Memorandum in Opposition to Motion for Reargument filed.

Feb. 19, 1945 Order Denying Petition for Rehearing of Motion to File a Bill of Review filed.

Feb. 20, 1945 Copies of Order Denying Petition for Rehearing to Counsel.

April 3, 1945 Certified Copies of Proceedings in Petition for Leave to file a bill of Review to S. M. Heilbron.

May 21, 1945 Certificate of Filing Petition for Certiorari in the Supreme Court filed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Civil Action No. 8097.

October Term, 1942.

Charles A. Hottenstein, Carl Schmoyer and Andrew Fekety,

Plaintiffs,

R. Thomas Moore,

Intervenor-Appellant,

v.

York Ice Machinery Corporation,

Defendant-Appellee.

REPLY TO AFFIDAVIT OF GEORGE D. HORNSTEIN.

In the affidavit of Mr. Hornstein he quotes from the statement of Mr. Justice Black in reference to "tampering with the administration of justice". With that statement we are in full accord, and bearing it in mind, we desire to make certain comments on the sworn statements in Mr. Hornstein's affidavit.

THE APPRAISAL TESTIMONY.

The testimony before the appraisers was of two general types; one was *factual* testimony and the other was *opinion* testimony. The opinion testimony was that of

three experts in their field, each of whom was asked to express an opinion as to the fair value of the preferred stock on a specified date. They gave their opinions, together with their reasons for their respective conclusions, and all three explained at considerable length the factors they took into consideration in reaching their respective conclusions. In cross-examination they were asked for their views and opinions as to values of assets of the corporation, as to future earnings, as to future corporate taxes, etc. Their opinions as to the value of the stock were entitled to only such weight as the appraisers thought the opinions deserved, in the light of the reasons given by the experts in support of their respective conclusions, and in the light also of all other testimony then before the appraisers, *which included the evidence that had been before Judge Watson and which was then before the appraisers on the subject of the values of the corporation's fixed assets.* The references on page 4 of Mr. Hornstein's affidavit to answers given by the experts to single questions put to them on cross-examination give an utterly inadequate, and therefore misleading, impression of the testimony of those experts.

Mr. Hornstein also says:

> "Assuming the honesty of the defendant's most recent position—that they believe to be true the testimony of the experts presented before the appraisers (p. 5 of their answer on this motion) * * *."

This is a reckless, or at least careless, statement. Our Answer does *not* state that we "believe to be true the testimony of the experts presented before the appraisers" * * *. Our Answer asserts that our "factual" testimony was true. The exact language is:

> "To the extent to which factual testimony was presented to the Appraisers on behalf of respondent, that testimony was true to the best of respondent's then and present knowledge, information and belief."

Manifestly, the testimony of the experts was *opinion* testimony, pure and simple. The opinion testimony that was given consisted of bona fide opinions of competent experts of integrity.

Speaking of earnings, the Hornstein affidavit says (p. 4):

> "* * * the testimony submitted by the defendant in the injunction suit was based upon prospective earnings almost double that sworn to by defendant's witness in the appraisal proceeding."

This reference to testimony in the appraisal proceedings evidently is to testimony of one of the experts, Mr. Bancroft, who gave his estimate of future net earnings as $490,000.00 per annum *after* taxes. The above quoted language from the Hornstein affidavit conveys the impression that Mr. Bancroft's estimate was the only attempted forecast before the appraisers of future earnings. The fact, however, is that not only did the other experts give higher estimates but the appraisers had before them the estimate given by Day & Zimmerman in the injunction suit of annual net earnings of from $1,000,000.00 to $2,000,000.00 before *interest and* Federal taxes. Since the interest charges at that time amounted to more than $300,000.00, this would be equivalent to an estimate of net before Federal income and excess profit taxes of between $700,000.00 and $1,700,000.00. The estimate of future net earnings given to the appraisers by the only officer of the Company who gave any testimony on that subject before the appraisers is consistent to a marked degree with the testimony on that subject as given in the injunction suit because Mr. Lebor, the present Treasurer of the Company, testified to the appraisers that in his opinion the future earnings would be about $1,500,000.00 before Federal income and excess profit taxes. His testimony on this subject appears on pages 545 and 546 before the appraisers and is as follows:

"By Mr. Kann:

* * * * * * *

RQ. On an amount of that nature what would be the profit before taxes, after all charges except taxes?

A. That I am not prepared to give an opinion on. We hope that we are going to improve the Company's profits.

RQ. You have worked out no percentages as to what the margins would probably be if the volume were on that basis, but have you any personal opinion?

A. I can give you this: in my own responsibility, which is in the field of financial management, I have had to do some thinking on that, and I have personally used a twenty million, 7½ per cent margin of profit, which is better than we have done before. *It is higher than I heard Mr. Bracken testify to this morning.*

RQ. That would be about a million and a half dollars. That would be before taxes?

A. Before taxes? No, after all taxes except taxes based upon income—that is, Social Security, and all that. Everything except income and excess profit taxes."

Thus, the testimony of Lebor, the only officer of defendant who gave any testimony on the subject before the appraisers, not to speak of the testimony of the other two experts, shows that Mr. Hornstein was not justified in what he says in his affidavit on this subject.

We have italicized a portion of the above quotation from the testimony to emphasize the essentially opinion nature of the testimony given by our experts, and to show that on this subject of future earnings Mr. Lebor not only gave a higher estimate than one of the experts who preceded him, but mentioned specifically that his estimate was higher.

The Hornstein affidavit also refers to the testimony of Mr. Bancroft as giving "the assets of the corporation

* * * a value of not more than $4,000,000.00." That Mr. Bancroft was giving his opinion of the value of the shares of *stock*, and not of *assets*, appears from his following testimony on cross-examination (p. 512):

> "X. Assuming that that was the fair value, and taking a value of $3,800,000, you mean to say that the net worth of this Company was not more than four million?
>
> "A. I am talking about the value of the stocks of the Company, not the net worth."

Mr. Hornstein's affidavit also says, regarding the value of the assets of the corporation, that "another of their experts, more specific than the first, placed a value of exactly $3,944,000.00" (pp. 519-520).

Again, Mr. Hornstein is not frank, since Mr. Bracken was discussing the valuation of the preferred stock, not the valuation of the assets, as appears from his testimony (p. 520) as follows:

> "X. In your opinion, in June, 1942, a fair offer for this Company would have been four million dollars. Is that right?
>
> A. Well, I said $3,944,000.
>
> X. Close enough. Approximately four million dollars would have been a fair appraisal for the purchase of this whole Company, lock, stock and barrel? That is your opinion?
>
> A. I refuse to say whether that is for purchase or not. I say that is my valuation of the preferred stock, and I give no equity for the common stock other than a very speculative value."

All three experts in the appraisal proceeding testified that they took asset value as well as other factors into consideration in determining the value of this stock, but all three agreed in stating that asset value was not a major

factor in valuing the stock. All three experts agreed that, if assets alone were considered, the stock would have a value in excess of its call price plus accrued dividends, but all three experts were also in agreement that the stock could not properly be valued on that basis. By way of illustration, we quote the following from the testimony of one of the experts, Mr. Naess, on this subject (pp. 277-278, 280):

> "The sixth method of approach is asset value. The asset value of the preferred stock of York Ice Machinery Corporation was in excess of par value plus arrears. The book value as of September 30, 1942, was approximately 213.50. Par value plus arrears was 205—the call price plus arrears was 205. * * * That is a very small coverage on an asset basis for preferred stock. However, in accordance with the Day & Zimmerman report there was a substantially greater value on appraised reproduction new after depreciation, although that report does not indicate the real value for the property, but I have to make an allowance somewhat for that so I would say that the asset value of this preferred stock on whatever basis you wish to put it covers the call price plus arrears. * * * So that, in my opinion, assets are not of any great importance in determining the value of the stock, and that holds because after all the purpose of assets is to have earning power and if the Company does not have earning power it does not have earning power however great its assets may be."

THE QUESTIONS INVOLVED IN THE INJUNCTION SUIT AND IN THE APPRAISAL PROCEEDING WERE NOT THE SAME.

In view of certain questions asked by Judge Biggs at the oral argument, and since the Hornstein affidavit makes

ect that the questions involved in an argument to the ef the same as in the appraisal pro- the injunction suit were omit the following supplement to ceeding, we beg to su- ief filed at the oral argument: what is stated in our b

e the District Court was to deter- The problem befor- er plan was fair; or, more accu- mine whether the merg- ther the merger plan was so mani- rately, to determine wh- uld be enjoined because construc- festly unfair that it sh tively fraudulent.

It should not be ov- rlooked that in the injunction suit the court was not deali- g with a reorganization of an in- solvent corporation un- er the Bankruptcy statute, where the court is charged by the statute with a duty of deter- mining the fairness of the plan, and in connection with which the court may be required to make findings of values of assets in order to determine what participation, if any, holders of corporate securities are entitled to have in the plan. On the contrary this was a statutory proceeding under Section 59 of the Delaware statute, where the man- agement of the corpora- ion, in the first place, and there- after the stockholders b- y a two-thirds vote, decide, in the manner prescribed by t- e statute, for or against the adop- tion of the plan. Unde- the statute the vote of the com- mon stock was required for the adoption of this plan be- cause the common stock controlled this corporation; and consequently, as point- d out in the North American Cement Corporation cas- e cited on our previous brief, par- ticipation in the plan b- the common stock would reason- ably be expected as a practical matter. In such a case the function of the cou- t, in contrast with its function in insolvency cases, is to d- termine merely whether the man- agement and the statut- ory majority abused their power and discretion. In deci- ing this question the court viewed all pertinent facts *as a whole*. Value of assets was an element, but only as pa- t of a broad picture, in the con- sideration of the whole determine or adjudicate of which the objective was not to the value of assets. The District

Court had before it not only the balance sheet of September 30, 1940 (upon which plaintiff relied), which showed a deficit for the common stock, but the Court also had the balance sheet of September 30, 1941, which had come out prior to the hearing before Judge Watson, and which showed an equity for the common stock as the result of earnings for the year. The plan before the Court showed additional benefits conferred upon the holders of the Preferred Stock which had an important bearing upon whether the Preferred Stock was treated unfairly by the plan. Upon a consideration (necessarily) of the whole picture, the District Court decided that the plan was not unfair to the Preferred Stock and that the plan would not be enjoined. Even if Judge Watson had made a finding of the value of the *assets* (which he did not) in connection with his decision as to whether the plan was or was not unfair, this would not determine the value to be placed upon the *stock* (for purposes of payment) in appraisal proceedings. One reason is that, in the injunction suit, the benefits expected to be obtained from the plan occupied an essential place, whereas in the appraisal proceeding the benefits expected to be derived from the plan are *expressly* excluded by Section 61 of the Delaware Corporation Law. Another reason is that the *sole* question before the Appraisers was the value of the *stock*, and that value was based upon factors in addition to asset values. Indeed, it is a well known and generally accepted view, to which all three of our experts testified, that values of fixed assets are not as important as other factors in determining the value of stock of a corporation. The Hornstein affidavit states that the proceeding before the Appraisers "should have been a mere formality", presumably because of evidence in the injunction proceeding as to values of assets. This is utterly absurd, not only for the reasons we have just stated, and because the statute commits to the appraisers the power and duty to value the stock, unaffected by any benefits expected from the merger, but also because

a decision by the Appraisers based solely upon asset values would have been invalid under the decision of Chancellor Wolcott in *Chicago Corporation* v. *Munds*, 20 Del. Ch. 142, 172 Atl. 452. In that case the corporation was an investment company whose assets consisted principally of cash and marketable securities. The Appraisers based their valuation solely upon the market price of the stock, which was traded in on the Chicago Stock Exchange. Because of the nature of the corporation's assets it was contended that the stock should have been valued on the basis of its assets. The Chancellor held that the apraisers were in error in using the market price as the sole test, and also held that it would have been improper to use asset values as the sole test, and he concluded his opinion as follows:

> "There is no need at this stage of the case for me to enter upon a discussion of the sort of considerations which should be taken into account in the valuing the defendants' stock. Market value undoubtedly is a pertinent consideration. So is net asset value. Neither, however, deserves necessarily to be accepted as exclusive. Those are the only two standards of measure that the respective parties to this cause have insisted upon as governing, and I shall abstain from embarking upon a general discussion touching other possible elements that might under varying circumstances be taken into account."

The views expressed by the experts in the appraisal proceeding with respect to the weight to be given asset values in determining the value of the stock are consistent with the above cited case because the cited case was one where the assets could readily and quickly have been reduced to cash in the open market and yet Chancellor Wolcott held, even in that case, that it was improper to take asset values alone as the determining factor.

In view of the decision in the Chicago Corporation case, it is apparent how unsound is the statement in the Hornstein affidavit to the effect that the "appraisal proceeding should have been a mere formality." That is but another way of asserting that the stock should have been valued on the basis of assets alone.

Respectfully submitted.

GEORGE S. MUNSON,
AARON FINGER,
Attorneys for Defendant.

DECEMBER 18, 1944.

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FILED
JUN 9 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944

No. 1282

CHARLES A. HOTTENSTEIN, CARL SCHMOYER, and ANDREW FEKETY,

Petitioners,

—*vs.*—

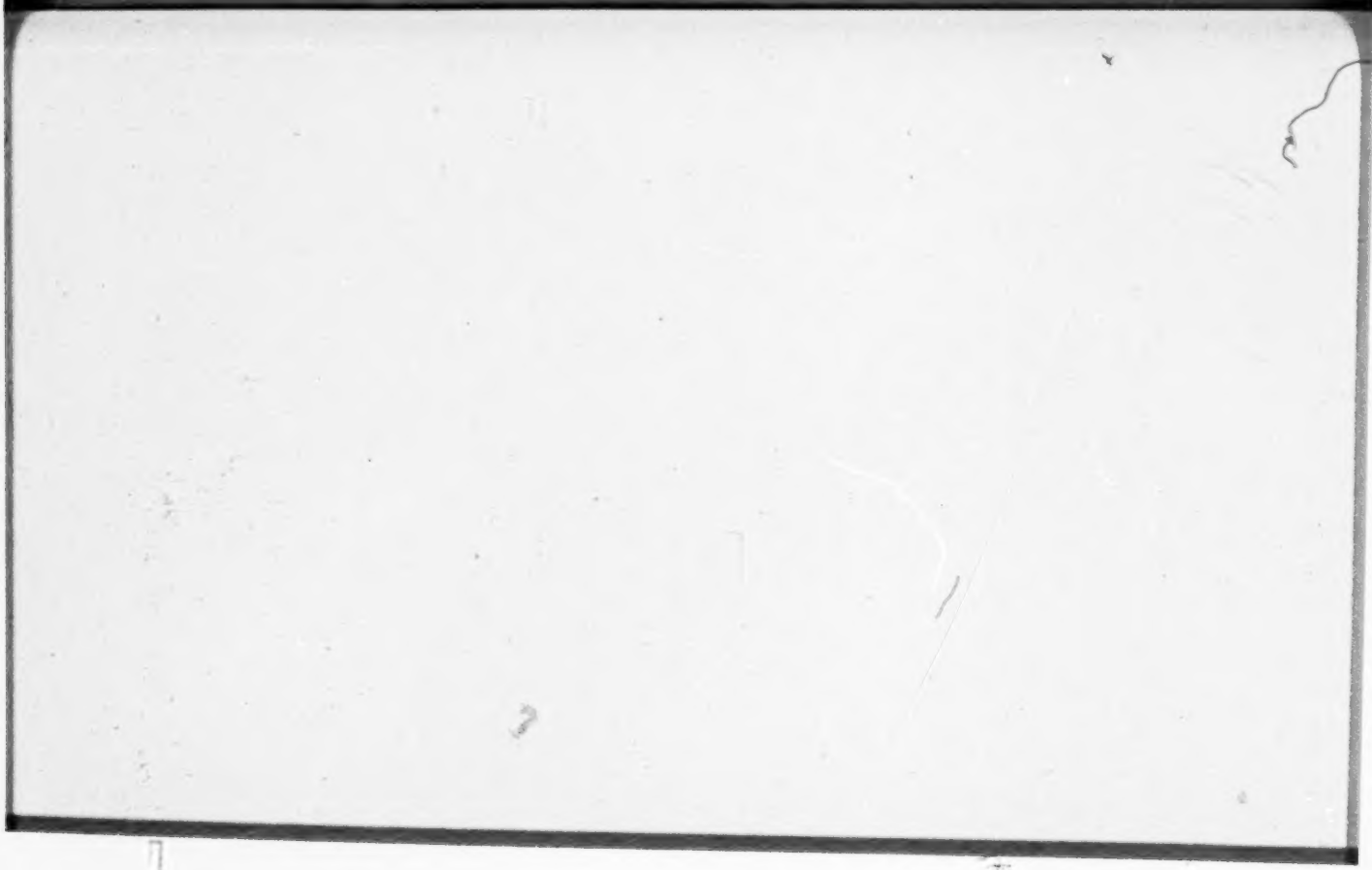
YORK ICE MACHINERY CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO CORRECTING DIMINUTION OF THE RECORD

ARTHUR GARFIELD HAYS,
GEORGE D. HORNSTEIN,
Counsel for Petitioners.

June 7, 1945.



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Respondent.

BRIEF IN OPPOSITION TO CORRECTING DIMINUTION OF THE RECORD

Petitioners interpose no objection to the Court's directing that the Record be supplemented, if the Court feels that the alleged omissions would prejudice the Respondent.

The "Reply of Defendant to Affidavit of George D. Hornstein" was a brief, not an affidavit. Respondent wishes this paper added to the Record. It was not originally included because the Clerk of the Circuit Court of Appeals for the Third Circuit specifically stated that in that Circuit it is not the practice to certify as part of the Record briefs of counsel. It will be noted that the Docket Entries refer to other briefs—on both sides—which Respondent does not suggest should be part of the Record.

The brief which Respondent wishes added to the Record was a "Reply" to the affidavit of George D. Hornstein, appearing *amicus curiae* by leave of court. Respondent had

attempted to divert attention of the Circuit Court, as it does of this Court, from the actual issue by urging that petitioners are not in court with clean hands. Mr. Hornstein who was present in court on behalf of other stockholders, stated orally to the court and by his affidavit documented his statement *and put on the record proof* that, in addition to the three petitioners, a number of *substantial stockholders of 10 years' standing*—stockholders long before the recapitalization was proposed—*are by stipulation equally affected* by the reopening of the injunction proceeding (R. 63, 76). Altogether 66 other stockholders (*whose names appear in the Record*) are directly affected by the decision on this application (R. 60-61, 75-77).

To this part of Mr. Hornstein's affidavit, Respondent's Reply Brief did not advert. All of the "Reply" is utterly immaterial to the issue before this Court. This Court is not asked to pass upon the merits but to rule as a matter of law upon the correctness of the decision of the Circuit Court of Appeals which after stating that the allegations of fraud *would* justify a bill of review nevertheless held itself barred from doing so because it "would be a futility" (R. 80-82)

Should this Court determine to add the "Reply" to the Record, it is respectfully asked to correlate with it other facts already appearing in the Record herein. For example between the two extracts from the Appraisal Testimony, quoted at page 7a of Respondent's Appendix, appeared the following (R. 70):

> "X. * * * Have you any idea what this Company was worth as a going concern as of June 29, 1942?
>
> "A. Yes, I have a very good idea.
>
> "X. As a going concern, what do you say this Company was worth?
>
> "A. I would say $3,944,000, approximately" (pp. 519-20).

The "Reply" (Appendix, p. 9a)—being a brief to the Circuit Court of Appeals—refers to "certain questions asked by Judge Biggs at the oral argument". If this Court accepts Respondent's "Reply" Brief as part of the record herein, it should permit a statement as to what Judge Biggs did ask on oral argument. He asked Mr. Finger, arguing for respondent, how his (Mr. Finger's) present denial that on the prior appeal respondent had urged that the corporation's assets were worth a minimum of $10,000,000 could be reconciled with the written opinions of both the District Court and the Circuit Court of Appeals at that time. Judge Biggs' question remains unanswered.

The proposed supplement to the Record has nothing to do with the issue before this Court. In Respondent's Brief in Opposition to the Petition for Writ of Certiorari *not a word* will be found on the legal issue before this Court until the last page and a half of the Brief (pp. 17-18). The Court is invited to compare those two pages, unsupported by reason or authorities, with the reasoned, documented Argument for the Petitioners.

Respondent's Brief reaches its climax in concluding that there is no public interest at stake; "it is merely one of the disputes that *frequently* follow merger proceedings between corporations." The "merger" in this case was conceded by the unanimous Circuit Court of Appeals to be merely a "'paper' merger" or subterfuge to effect recapitalization. If one now *frequently* finds false testimony at merger injunction proceedings, repudiated brazenly in subsequent appraisal proceedings, it is high time that this Court take a position that such conduct is not beyond the power of a Court to correct.

Respectfully submitted,

ARTHUR GARFIELD HAYS,
GEORGE D. HORNSTEIN,
Counsel for Petitioners.

June 7, 1945.